82-1235

No. _____

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1983

CHARLES E. LUNA, Petitioner

v.

STATE OF TEXAS, Respondent

On Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner denied due process of law because neither he nor his counsel of record was notified of the submission to the Dallas Court of Appeals of his one appeal of right for review of his conviction?

2. Does rule 204, Texas Rules of Post Trial and Appellate Procedure in Criminal Cases, violate due process by permitting submission to and disposition of an appeal by a court of appeals although counsel of record for the appellant is not notified of the submission?

Petitioner notes that 28 U.S.C § 2403(b) may be applicable and accordingly has served copies of this petition on the Texas Attorney General.

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PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner Charles E. Luna respectfully petitions this Court for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals in the case of Charles E. Luna v. State of Texas, No. 0732-82.

OPINION BELOW

The Texas Court of Criminal Appeals did not write an opinion in this case,

merely refusing Petitioner's petition for discretionary review, and overruling his motion to rehear the denial, pursuant to TEX. CODE CRIM. PROC. ANN. art. 44.45 (Vernon Supp. 1982) and TEX. CRIM. APP. R. rule 304 (1981). Copies of the judgment refusing the petition and order overruling the motion are set out in the Appendix, p. A1.

The intermediate appellate court, the Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas, wrote a per curiam opinion (unreported) affirming Petitioner's conviction and a copy of its opinion is set out in the Appendix, p. A2.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals refusing Petitioner's

petitioner for discretionary review was entered on October 13, 1982. Petitioner's timely motion for rehearing was overruled on November 24, 1982, and this petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION, STATUTE AND RULES OF COURT INVOLVED

U.S. CONST. amend. 14, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law;
> . . .

28 U.S.C. § 1257(3):

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
> . . .
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a

> State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

TEX. CRIM. APP. R. rule 204 (1981); TEX. R. CIV. PROC. ANN. rule 411 (Vernon 1967). Pertinent parts of the cited criminal and civil rules are quoted in the Reasons for Granting the Writ section of this petition.

STATEMENT OF THE CASE

Petitioner was convicted after a jury trial, on his plea of guilty, of commercial bribery, a felony, in violation of TEX. PEN. CODE ANN. § 32.43 (Vernon 1974), on July 13, 1979, in the 203rd District Court of Dallas County, Texas. He was sentenced on August 17,

1979, to five years' imprisonment in the Texas Department of Corrections.

After sentencing, Petitioner's trial counsel, Robert C. Hinton, Jr., Esq., informed him that he would not represent Petitioner on appeal without an additional fee. Petitioner believed the $25,000 fee already paid Mr. Hinton covered the appeal and, because the dispute could not be resolved, discharged Mr. Hinton as counsel. Petitioner subsequently retained Fred Head as counsel of record for the appeal, and Mr. Head notified the trial judge, Hon. Thomas B. Thorpe, on January 29, 1980, of Mr. Hinton's discharge and Mr. Head's retention. A copy of Mr. Head's letter to Judge Thorpe is included in the Appendix, p. A24.

Texas amended its constitution in November 1980 to add criminal jurisdiction to its intermediate appellate courts--the former courts of civil appeals--and legislation implementing the amendment and transforming these courts into courts of appeal took effect September 1, 1981.* Although the record in Petitioner's case was approved by the trial court on February 21, 1980, and transmitted to the Dallas Court of Appeals, that Court did not decide Petitioner's appeal until November 1981.

The clerk of the Dallas Court of Appeals docketed Petitioner's appeal and set it for submission but did not

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*See TEX. CONST. art. V, §§ 5 & 6; TEX. CODE CRIM. PROC. ANN. arts. 4.03 & 4.04, ch. 44 (Vernon Supp. 1982).

notify either Petitioner or his counsel of record, Mr. Head, of the submission date. The Dallas Court heard the appeal without a transcription of testimony at the trial, brief, or oral argument, and affirmed Petitioner's conviction, per curiam, on November 12, 1981.

When Mr. Head learned of the Dallas Court's decision, he filed a motion for rehearing, on November 30, 1981, which the Court overruled--after Mr. Head filed several additional motions and other requests for relief--on March 31, 1982.

Mr. Head timely petitioned the Texas Court of Criminal Appeals for discretionary review on May 3, 1982; that Court refused the petition on October 13, 1982, and overruled Mr. Head's timely motion to rehear the

denial, filed on October 28, on November 24, 1982.

Petitioner raised the issues of lack of notice, and consequent denial of due process, in the Texas Court of Criminal Appeals both in his petition for discretionary review and motion for rehearing. See the Appendix, pp. A4, A11, A20.

REASONS FOR GRANTING THE WRIT

> Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. Baldwin v. Hale, 68 U.S. (1 Wall.) 223, 233 (1864).

Petitioner was entitled to be heard in his only appeal of right--Texas law makes this clear*--but he was denied

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*An appellant in a criminal case in Texas enjoys the traditional rights to examine and except to the trial record,

this right because neither he nor his counsel of record was notified when the appeal was set for submission. This failure to give notice denied Petitioner due process of law guaranteed to him by the 14th amendment to the United States Constitution.

This Court more than three decades ago recognized that, if a state affords an appeal of right of a conviction, the appellate procedure must comply with the standards of due process. Cole v. Arkansas, 333 U.S. 196, 201 (1948). Texas appellate procedure with respect to notice does not.

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submit original and supplemental briefs to the appellate court, appear before that court in person or through counsel, and to argue the appeal orally to the court. See TEX. CODE CRIM. PROC. ANN. arts. 40.09. § 9, 44.33 (Vernon Supp. 1982); TEX. CRIM. APP. R. rule 205 (1981).

Rule 204 of the Texas Rules of Post Trial and Appellate Procedure in Criminal Cases provides in its entirety:*

> Rule 204. NOTIFICATION OF SUBMISSIONS.
>
> The clerk of each court of appeals is directed to use all reasonable diligence to notify counsel of record of all settings in criminal cases, though the failure to receive notice will not necessarily prevent or defeat the submission of the case on the day on which it is set. Within 15 days of the mailing of the notice of the setting, all counsel of record will acknowledge receipt of such notice and advise the clerk whether or not oral argument is desired. Failure to advise the clerk will constitute a waiver of oral argument. Provided, however, that a court of appeals may direct that a particular case be argued orally. [Emphasis added.]

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*The Texas Rules of Post Trial and Appellate Procedure in Criminal Cases were promulgated by the Texas Court of Criminal Appeals pursuant to TEX. CODE CRIM. PROC. ANN. art. 44.33(a) (Vernon Supp. 1982) and have the force of law.

The clerk of the Dallas Court of Appeals did not notify Mr. Head, Petitioner's counsel of record for the appeal, of the case's setting so Mr. Head had no opportunity to request oral argument. The Dallas Court of Appeals applied the next-to-last sentence of rule 204 to treat Mr. Head's lack of request as a waiver of oral argument, and then applied the second clause of the rule's first sentence to waive his appearance and hear the appeal on the date set without him.* As a result,

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*Petitioner recognizes that the second clause of rule 204's first sentence is ambiguous: the phrase "will not necessarily prevent or defeat the submission" arguably permits a court of appeals to postpone submission if counsel was not notified. In this case the appeal was submitted when set, although Petitioner's counsel was not notified, so it is immaterial whether the quoted phrase could in another case be interpreted to permit postponing submission.

Mr. Head had no opportunity to obtain and submit a transcription of the testimony at the trial (called a statement of facts in Texas practice), to prepare and submit a brief, or to argue orally before the court. Had Mr. Head been notified, he would have been able to show the Dallas Court of Appeals that Petitioner was denied the effective assistance of counsel at his trial. As it was, the Dallas Court of Appeals noted in its half-page, per curiam opinion affirming Petitioner's conviction that it did so without the benefit of a statement of facts or brief. (Appendix, p. A2.)

This Court in another Texas case struck down as violating due process a Texas law dispensing with notice to an individual before he was deprived of a

fundamental liberty interest. In Armstrong v. Manzo, 380 U.S. 545 (1965), the natural father lost custody of his daughter in a judicial proceeding of which he was given no advance notice and in which he thus did not appear. This Court wasted little time in faulting the lack of notice:

> . . . It is clear that failure to give the petitioner notice of the pending adoption proceedings violated the most rudimentary demand of due process of law. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Tr. Co., 339 U.S. 306, at 311.

Id. at 550.

The respondent in Armstrong argued that any harm resulting from the

original lack of notice was cured when the natural father was granted a rehearing in the trial court that stripped him of custody. This Court disagreed, pointing out that respondent's burden of proof--to establish that the natural father did not contribute to the best of his ability to his daughter's support--shifted on rehearing to the natural father to prove that he did so contribute. This shift in the burden of proof clearly harmed the natural father, because the trial court on rehearing refused to vacate the award of custody to respondent, and it was a harm directly attributable to the failure of Texas law to give him notice of the original proceeding.

The application of criminal appellate rule 204 in the instant case

caused the same kind of harm to Petitioner: He was not given notice of the submission of his appeal to the Dallas Court of Appeals and his motion to that Court to rehear the appeal was overruled without opinion.

It is instructive to contrast the provisions of criminal appellate rule 204 with those of the rules governing notice of submission of civil appeals. Rule 411 of the Texas Rules of Civil Procedure provides:

> Causes on the trial docket of the Court of Civil Appeals which are not advanced as otherwise provided shall be submitted in the order of the date of filing and the clerk shall notify the parties or their attorneys of the date of filing, and of the date of submission, by letter delivered in person or through the mails.

The clerk's duty to notify counsel of the submission date is unqualified under the civil rules.*

The failure of the clerk of the Dallas Court of Appeals to notify Petitioner's counsel of the submission date was no doubt the result of the confusion surrounding that Court's expansion from three to nine judges** pursuant to its receipt of criminal jurisdiction and transformation into a court of appeals. It is likely that, sometime during the 21 months between approval of Petitioner's appellate record and

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*Rules 21a and 21b of those same civil rules require that service of all notice under the rules be made in person or by registered or certified mail. Certified mail with return receipt requested of course provides a simple and inexpensive method of proving service.

**See TEX. REV. CIV. STAT. ANN. art. 1812 (Vernon Supp. 1982).

the Court's decision on his appeal, parts of that record were misplaced or jumbled. Whatever the reason, however, the lack of notice permitted by rule 204 denied Petitioner the opportunity to participate in his one appeal of right.

CONCLUSION

For the foregoing reasons, a writ of certiorari to the Texas Court of Criminal Appeals should be granted in

Petitioner's case and the judgment entered October 13, 1982, refusing Petitioner's petition for discretionary review, should be reversed.

Respectfully submitted,

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E. Luna

CERTIFICATE OF SERVICE

I certify that on January 20, 1983, I served three copies of this Petition for Writ of Certiorari to the Texas Court of Criminal Appeals on each of the following individuals by depositing the copies in the United States Mail, with first-class postage prepaid, addressed to:

(1) Henry G. Whitley, Esq., Assistant District Attorney, Dallas County Courthouse, Dallas, Texas 75202.

(2) State Prosecuting Attorney, State of Texas, Box 12405, Austin, TX 78711.

(3) Hon. Jim Mattox, Texas Attorney General, Box 12584, Austin, TX 78711.

Seth A. Searcy III

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